1988

Stanley B. Bonham and Anne M. Bonham, Boyd F. Summerhays, and Arleen M. Summerhays v. Robert L. Morgan, Utah State Engineer, Salt LAke County Water Conservancy District, a Political Subdivision of the State of Utah and a Body Corporate, and Draper Irrigation Company, a Utah corporation : Brief of Appellant

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STANLEY B. BONHAM and ANNE M. BONHAM, BOYD F. SUMMERHAYS, and ARLEEN M. SUMMERHAYS, Plaintiffs-Appellants **vs.** ROBERT L. MORGAN, Utah State Engineer, SALT LAKE COUNTY WATER CONSERVANCY DISTRICT, a Political Subdivision of the State of Utah and a Body Corporate, and DRAPER IRRIGATION COMPANY, a Utah Corporation, Defendants [ROBERT L. MORGAN, Utah State Engineer, is the only Defendant-Respondent to this Appeal]	Case No. 880143

APPELLANTS' BRIEF

APPEAL FROM RULE 54(b) FINAL SUMMARY JUDGMENT

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

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COMPLETE LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE THIRD JUDICIAL DISTRICT COURT

The complete list of all parties in the Third Judicial District Court is reflected in the caption of the case on the cover hereof. There are no parties not identified in the caption. The only parties to the proceedings in the District Court are ROBERT L. MORGAN, Utah State Engineer, SALT LAKE COUNTY WATER CONSERVANCY DISTRICT, a Political Subdivision of the State of Utah and a Body Corporate, and DRAPER IRRIGATION COMPANY, a Utah Corporation.

Only the Defendant ROBERT L. MORGAN, Utah State Engineer, is involved as a Respondent to this Appeal.

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JURISDICTIONAL STATEMENT

The statutory authority which confers jurisdiction on this Court to hear this appeal is found in §§ 78-2-2(3)(e)(v), 78-2-2(3)(i) Utah Code Annotated, 1953, as amended, in Rule 54(b) of the Utah Rules of Civil Procedure and in Rule 4(a) of the Rules of the Utah Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are the Plaintiffs "aggrieved persons" to the Memorandum Decision of the Utah State Engineer as the term "aggrieved persons" is used in § 73-3-14 Utah Code Annotated, 1953, as amended? The decision of the Utah State Engineer referred to in this issue is reproduced in the Addendum.

2. Do the duties and responsibilities imposed by the Utah Legislature upon the Utah State Engineer in § 73-3-8 Utah Code Annotated, 1953, as amended, apply to Permanent Change Applications which are described, dealt with, and covered by § 73-3-3 Utah Code Annotated, 1953, as amended?

CONSTITUTIONAL PROVISIONS

The only constitutional provision whose interpretation the Plaintiffs believe is determinative is Article 1, Section 11, Utah Constitution. This provision is reproduced in the Addendum.

STATUTORY PROVISIONS

Those statutory provisions whose interpretation the Plaintiffs believe are determinative are Sections 73-3-3, 73-3-8, 73-3-14 Utah Code Annotated, 1953, as amended. These provisions are reproduced in the Addendum.

NATURE OF THE CASE

This case involves a claim by the Plaintiffs against Robert L. Morgan in his official capacity as the Utah State Engineer in Count 1 of the Plaintiffs' Second Amended Complaint, hereafter "Complaint" [R. 53]. A claim is also made against the other Defendants, to-wit: Salt Lake County Water Conservancy District ("D") and Draper Irrigation Company ("Draper") in the remaining Counts of the Complaint.

In Count 1, which is the only Count involved in this Appeal, the Plaintiffs appeal to the District Court from the Memorandum Decision of the Utah State Engineer. This Decision is dated December 26, 1985, and involves Change Application No. 57-3411 (a13077). A copy of this Decision is included in the Addendum. The Decision describes generally the issues included in the Change Application, the Protest filed by the plaintiff Stanley B. Bonham, the hearings held by the Engineer and his investigation.

The Plaintiffs claim the Engineer erred in allowing the other Defendants' Change Application to be processed and to be approved,

because it enabled the other Defendants to construct diversion works to change the manner in which they had theretofore conveyed water from the vicinity of Bell Canyon Reservoir to the Defendants' water treatment plant in Draper, Utah. These diversion works consisting of a screwgate, pipeline and other structures were constructed on the hillside to the east of the Plaintiffs' property, thereby causing substantial flooding damage to their property and also to public property in the vicinity, including Dimple Dell Road, a proposed site for a public park to be owned by the Salt Lake County Recreation Department, and to quasi public irrigation systems. This flooding damage consists of a virtual waterfall cascading down the hillside bringing debris, boulders, and other objects onto the Plaintiffs' property, thereby destroying fences, gouging said property, and interfering with horse and cattle businesses which each of the Plaintiffs had conducted on their property for several years prior to the time the damage began. None of this damage occurred prior to the time the Engineer approved the Change Application.

DISPOSITION IN THE LOWER COURT

Following the filing of the Plaintiffs' Second Amended Complaint, and after the Plaintiffs submitted certain interrogatories and requests for production of documents [R. 252] to all defendants, the said Engineer filed a Motion For Summary Judgment and a Memorandum in support thereof on September 8, 1987

[R. 293, 300]. At this time the Engineer had not conducted any discovery of his own nor had the other defendants. Plaintiffs filed their Memorandum in opposition to the said motion [R. 474]. On December 4, 1987, the trial judge, Raymond S. Uno, granted the Engineer's Motion For Summary Judgment, in a Memorandum Decision [R. 519]. Thereafter a proposed judgment was prepared by the Engineer's counsel and served upon the other parties [R. 523].

The Defendant Salt Lake County Water Conservancy District entered an objection to the Engineer's proposed judgment requesting that it be identified as a final judgment pursuant to Rule 54(b) Utah Rules of Civil Procedure ("URCP") [R. 538]. The Engineer filed his response to the Conservancy District's objections, stating that Judge Uno's Memorandum Decision did not contemplate a Rule 54(b) Final Judgment [R. 541].

Thereafter, a hearing was held on January 22, 1988, at which time counsel for the Plaintiffs was given permission to file legal authorities dealing with the effect of a Rule 54(b) Judgment on the proceedings in the District Court. These legal authorities were cited and discussed in a letter dated February 9, 1988, from Plaintiffs' counsel to Judge Uno, with copies to the other parties [R. 566]. There were no responsive letters from any other counsel in opposition to the cases and authorities cited and discussed in the said letter found at R. 566.

On March 14, 1988, the trial judge signed the "Judgment and Order Expressly Directing Entry of Judgment Pursuant To Rule 54(b)" [R. 599]. The Plaintiffs filed their Notice of Appeal on April 11,

1988. [R. 609]

There were no evidentiary hearings held by the trial judge in the District Court, therefore no court reporter's transcript has been filed in this Court. The Engineer's Motion For Summary Judgment was decided strictly on legal grounds as cited and discussed in the Engineer's Memorandum [R. 300] and in the Plaintiffs' Memorandum in opposition to the said motion for summary judgment [R. 474].

RELIEF SOUGHT ON APPEAL

The Plaintiffs seek to reverse the decision of the Honorable Raymond S. Uno, trial judge, on the grounds his "Judgment and Order Expressly Directing Entry of Judgment Pursuant To Rule 54(b)" constitutes manifest error. The Plaintiffs seek to have Count 1 of the Second Amended Complaint reinstated, so the Plaintiffs can pursue their cause of action in the said Count 1 against the Defendant Robert L. Morgan, Utah State Engineer.

STATEMENT OF FACTS

In his "Memorandum In Support of Defendant Utah State Engineer's Motion For Summary Judgment," [R. 300] the Engineer on page 2 characterizes the substance of his Motion as follows:

> This motion is directed only to Count I of the Second Amended Complaint, which seeks a de novo appeal from the Decision of the State Engineer approving the application of Defendants Draper Irrigation Company and Salt Lake Water Conservancy District to change the point

> of diversion, place and nature of use of certain water rights. This motion is not directed toward any of the claims for relief set forth in the balance of the Complaint; but since Count I is the only Count involving Defendant Utah State Engineer, the granting of this motion would dismiss the appeal of the State Engineer's Decision approving the change. It will leave the balance of Plaintiffs' claims intact, to be addressed on their own merits, and Plaintiffs will have their day in court on those claims.

Count 1 of Plaintiffs' Second Amended Complaint ("Complaint") seeks to review the Memorandum Decision of the Engineer dated December 26, 1985, which approved Change Application No. 57-3411 (a13077) filed by the other Defendants Salt Lake County Water Conservancy District and Draper Irrigation Company [R. 53]. A copy of the said Memorandum Decision is attached as Exhibit 1 to the said Complaint and is also included in the Addendum hereto.

The Change Application was filed pursuant to § 73-3-3 Utah Code Annotated, 1953 as amended, and sought to change the point of diversion, place and nature of use of certain water rights in Bell Canyon, the Middle and South Forks of Dry Creek, Rocky Mouth, and Big Willow Creeks. Notice of the Change Application was published in the Deseret News from June 28, 1984, through July 12, 1984. Plaintiff Stanley B. Bonham filed a timely Protest to the said Change Application on the grounds the proposed change would cause flooding and other hazardous conditions to his property and would also be detrimental to the public welfare. [See Engineer's Recitation of Facts in the said Memorandum Decision.]

On February 26, 1985, a formal hearing was held by the Engineer in his offices in Salt Lake City, Utah, to determine the merits of the Change Application and also the Protest filed by

Bonham. At the hearing, the Plaintiff, his attorney, and private engineer were present and presented evidence in the form of aerial photographs, color photographs, and other testimony showing substantial flooding to the Plaintiffs' property during 1983 and 1984. This testimony and evidence supported Plaintiffs' contention that the Change Application and the structures and improvements to be installed by the Defendants as a part of the Application would cause repeated flooding of the Plaintiffs' properties, would unreasonably effect public recreation, would prove detrimental to the public welfare, and in fact had already substantially destroyed portions of the Plaintiffs' property [See allegations in Count 1 of the Complaint at R. 53].

In their Complaint, the Plaintiffs allege [and the Plaintiffs submit these allegations must be accepted as true for the purpose of the Motion For Summary Judgment, since there are no contraverting affidavits or other pleadings filed by the Engineer to refute any of the allegations in the said Complaint], the Engineer failed to review the plans and specifications dealing with the improvements to be constructed by the Defendants Draper and District as a part of the Change Application. The Engineer further failed to conduct the investigation required by § 73-3-8 Utah Code Annotated, 1953, as amended, to determine what damage the said Change Application would have to either private or public property and whether the Change Application would prove detrimental to the public welfare. The Plaintiffs further claim the Engineer also failed to comply with the provisions of § 73-3-3(2) Utah Code

Annotated, 1953, as amended, in that the Engineer failed to consider the duties of the applicants -- Draper and Conservancy District -- in connection with the Change Application to the same degree and with the same emphasis the Engineer would be required to consider these same duties, if the other Defendants had filed an original water application under § 73-3-2.

Approximately ten months after this formal hearing, the Engineer entered his Memorandum Decision. Although the Engineer allowed the Plaintiff Bonham to file a timely and formal protest, and even though he held a hearing on the said protest, and allegedly investigated the issues involving the protest, the Engineer stated in paragraph 1 on page 2 of his Memorandum Decision that he was "without authority relative to damages which may have been sustained in connection with project construction which occurred as a result of his reaction to water right applications...". This conclusion was made in flagrant disregard of the clear mandate of § 73-3-8 Utah Code Annotated, 1953, as amended, which imposes a statutory duty upon the Engineer to investigate any and all damage to public or private property and the impact the Application will have upon the public welfare.

In their Complaint, the Plaintiffs allege they had lived peaceably on their properties in Sandy, Utah, for approximately 20 years without being flooded by water in the ditches owned by the other Defendants, Draper Irrigation Company and Salt Lake County Water Conservancy District. The Plaintiffs' properties consist generally of ten or more acres of ground which are described in

Exhibits 1 and 2 attached to the Complaint [R. 53]. The Plaintiffs each had a cattle and horse business operating on their properties. The Plaintiffs allege that for approximately 100 years since the time the Defendant Draper Irrigation Company first began to construct open ditches, flumes, pipelines, and other structures to carry water from the vicinity of Bell Canyon Reservoir to Draper's Water Treatment Plant in Draper, Utah, the water had been carried with no adverse consequences to the Plaintiffs' property. During the 20 years or so the Plaintiffs owned and occupied their properties, there was no more than a trickle of water that ever drained down the hillside to the east of their properties, and none of this water ever caused any annoyance, nuisance or damage to person or property.

However, commencing in the spring of 1983, as a sole, direct and proximate cause of the negligence of the Defendant Engineer in granting preliminary approval to the Change Application described above, the said Engineer permitted an inherently dangerous condition to exist on the hillside immediately to the east of the Plaintiffs' properties. This inherently dangerous condition allowed the other Defendants to convey substantial waters from one natural watershed to another and to do so without any authority or permit from the Salt Lake County Flood Control and Public Works Department. The Engineer authorized the construction of a screwgate, pipeline and diversion works which had not formerly existed. These changes allowed the water which had been routinely, for the past 100 years or so, conveyed without incident from the

Bell Canyon reservoir area to the Water Treatment Plant in Draper, Utah, to now be diverted down the hillside, immediately to the east of Plaintiffs' properties, causing a virtual waterfall to cascade down the hill, causing tremendous damage to the Plaintiffs' property and the public property in the area. The Plaintiffs' properties were gutted, fences were destroyed, deep ravines and crevices were carved out, large boulders and other debris as well as silt were deposited on the properties. In addition, public roads and properties belonging to the Salt Lake County Parks Department were destroyed, along with irrigation ditches belonging to other ditch companies. [See allegations in Counts 1-3 of the Complaint at R. 53].

All this damage was done without notice to the Plaintiffs, without their approval, and without obtaining any consent whatsoever. Damage occurred in 1983, against in 1984, and will occur every year in the future when the Defendants close their screwgate, allowing waters from the Middle Fork and South Fork of Dry Creek to be diverted down the hillside upon Plaintiffs' properties; rather than to be conveyed in a pipeline or an open ditch to the Defendants' Water Treatment Plaint in Draper, Utah, as had been done for decades prior to 1983.

All of the foregoing "Factual Allegations" are set forth in detail in Plaintiffs' Second Amended Complaint [R. 53]. Again, since there have been no affidavits contraverting any of the allegations in the said Complaint, this Court must accept those allegations as true for the purpose of motions for summary

judgment.

SUMMARY OF ARGUMENT

The Plaintiffs submit the Defendant Utah State Engineer is jointly and severally liable with the other Defendants in this action for the inherently dangerous condition which the Engineer authorized on the hillside to the east of the Plaintiffs' properties. The Engineer was an active participant and expressly approved the offending diversion works and screwgate which allows severe flooding damage to occur to private and public properties each time the screwgate is closed by the Defendants.

None of the cases cited by the Engineer in his Memorandum in Support of his Motion For summary Judgment [R. 300] deal with the issues raised in this instant lawsuit and not one of the cases discusses the definition of "aggrieved parties" in § 73-3-14 UCA, 1953, as amended, or whether the duties and responsibilities imposed upon the State Engineer by § 73-3-8 apply to Change Applications.

The Plaintiffs submit the core issue before this Court is whether the Utah State Engineer has complied with the requirements in §§ 73-3-3(2) and 73-3-8 to conduct an adequate investigation to determine whether the Change Application will prove detrimental to the public welfare, will unreasonably affect public recreation or the natural stream environment. The Engineer argues he has no duty to make the required investigation, the Plaintiffs contend he does.

The Engineer admits he has these duties of investigation in connection with an original water application filed pursuant to § 73-3-2, but he is merely a "bump on a log" and can close his eyes to any damage to private or public property when he is considering Permanent Change Applications under § 73-3-3. [See R. 309 note 1 in the Engineer's Memorandum where he admits "Interests other than impairment of water rights are considered by the State Engineer in passing an applications to appropriate water under § 73-3-8, but...such criteria do not apply to Change Applications." No citations are given to support this proposition, and no cases have ever been cited by the Engineer which hold permanent Change Applications do not need to be investigated to the same extent as original water applications. The instant cases are of first impression on this issue!]

With respect to "aggrieved parties," the Engineer cites lower federal court cases dealing with the "Zone of Interest" test, a test not found in any Utah statutes or Utah Supreme Court cases containing the state's water laws found in Title 73 of the Water Code. Furthermore, the Engineer has omitted to state to this Court that these lower federal court decisions discussing "Zone of Interest" have been modified by a 1987 United States Supreme Court decision which interpreted § 10 of the Federal Administrative Procedure Act (APA), 5 U.S.C. § 702 [5 U.S.C.S. § 702], which "grants standing to a person aggrieved by agency action within the meaning of a relevant statute." The court interpreted this § 10 to grant "generous review procedures" to aggrieved persons and

further refused to follow the "narrow construction" placed upon § 10 by earlier federal cases and by the Comptroller of the Currency. Clarke v. Securities Industries Association, 479 U.S. ____, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

The United States Supreme Court held the term "aggrieved person" in § 10 of the APA should be construed "not grudgingly but as serving a broadly remedial purpose." This case will be discussed in more detail below. This "narrow construction" of the term "aggrieved persons" adopted by the lower federal courts, is the same one adopted by the Utah State Engineer in his Memorandum [R. 300]. Counsel for the Engineer knew about this case because it was discussed orally at the hearing on August 6, 1987, yet counsel failed to bring this case to the attention of the Trial Court in his Memorandum. The only apparent reason for counsel's failure to cite this latest pronouncement on "Zone of Interest" by the highest court in the country is no doubt because counsel was aware the case argues against the position taken by the Engineer.

Finally, the Plaintiffs submit the Motion for Summary Judgment is far too premature at this early stage in the case to be considered. The Engineer has not undertaken any discovery, nor has the Engineer responded to the Discovery Documents submitted by the Plaintiffs [R. 252-254]. Plaintiffs submit that only after adequate discovery has been completed, can this case be in a position to entertain Motions for Summary Judgment, and until that time all such motions should be denied.

POINT 1

THE UTAH STATE ENGINEER'S MOTION FOR SUMMARY JUDGMENT IS NOT RIPE FOR DETERMINATION BECAUSE:

1. The Engineer has not conducted any discovery, nor did he submit any affidavits contraverting the allegations in the Plaintiffs' Second Amended Complaint;

2. There is a factual dispute whether the Engineer properly performed his statutory duties found in § 73-3-8 Utah Code Annotated, 1953, as amended, to investigate the Change Application and to determine its effect on the public welfare;

3. The granting of the Engineer's motion dismissed the Second Amended Complaint as to the Engineer, thereby violating the Courts' "open door" policy stated in Article I, Section 11, of the Utah Constitution.

1. The Engineer has not conducted any discovery, nor did he submit any affidavits contraverting the allegations in the Plaintiffs' Second Amended Complaint. At the time the Engineer filed his Motion For Summary Judgment [R. 293-295] and his Memorandum in support of the said Motion [R. 300-328], the said Engineer had not undertaken any discovery proceedings whatsoever. No depositions had been taken, and the Engineer had not submitted any interrogatories, requests for production of documents or requests for admissions. The only discovery outstanding at that time was that undertaken by the Plaintiff in submitting both interrogatories and requests for production of documents to the Engineer and to the other two Defendants [R. 252-254].

Nor did the Engineer submit any affidavits contravening any of the allegations in the Plaintiffs' Second Amended Complaint. The only affidavit submitted was that of Kent Jones stating he had checked the records in the office of the Engineer and could not find any evidence of the Plaintiffs owning any water rights in the Defendants' ditch facilities which were the subject of the Change Application [R. 291-292]. This affidavit does not impact on any of the statements in the Second Amended Complaint and is not material to the issues raised in either the Memorandum filed by the Engineer in the Trial Court [R. 300] or by the Plaintiffs [R. 474].

Under these circumstances, the Plaintiffs submit the Engineer's Motion For Summary Judgment is not ripe for determination at this time. Rule 56 of the Utah Rules of Civil Procedure, "URCP", provides summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the Engineer is entitled to a judgment as a matter of law." Since the Engineer has not undertaken any discovery nor filed any affidavits in opposition to the allegations in the Second Amended Complaint, these allegations must be taken as true. What the Engineer is attempting to do is to stop further proceedings against himself and to prevent the Plaintiffs from having a trial with respect to the allegations in their Complaint.

This Court has held on numerous occasions "summary judgment should be granted only when it is clear from the undisputed facts

that the opposing party cannot prevail. In considering a summary judgment motion, the Court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment." Conder v. Williams, 739 P.2d 634 (Utah 1987). This Court has also held that under Rule 56, summary judgment shall be rendered only if the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Doubts or uncertainties concerning issues of fact properly presented, or the nature of inferences to be drawn from the facts, are to be construed in a light favorable to the party opposing the summary judgment. Webster v. Sill, 675 P.2d 1170 (Utah 1983). See also Utah Farm Production Credit v. Wasatch Bank, 734 P.2d 904 (Utah 1987).

Applying these general principles to the case at hand, it is clear Count 1 of the Second Amended Complaint does state a cause of action against the Utah State Engineer for the reasons set forth hereafter in Points 2, 3 and 4 of this Brief. In Crafts v. Hansen, 667 P.2d 1068 (Utah 1985), this Court recognized on page 1081, "It is noteworthy that none of the respondents have, so far as we can determine, cited a single case wherein the Trial Court upheld an order of the State Engineer in a water dispute by summary judgment on the basis of opinion, testimony and affidavits. Every case discussed by the respondents was decided after a fair trial in District Court." Similarly, in the instant case, every case cited by the Engineer in his Memorandum in support of his Motion For

Summary Judgment [R. 300] involved a full trial in the District Court. Not only has there been no trial in the instant case, but the Engineer has neglected to file any affidavits contravening the allegations in the Second Amended Complaint. The Plaintiffs invite this Court to read the allegations in Count 1 of the said Complaint, which Count is primarily directed toward the Engineer.

Paragraph 9 of the Complaint states at the hearing held in the Engineer's office, the Plaintiffs' private engineer, Jack L. DeMass, presented evidence to demonstrate that the Plaintiffs' property and the public welfare had been detrimentally, adversely, and negatively affected by the Change Application approved by the Engineer. In paragraph 10, the Plaintiffs allege the Engineer, by approving the Change Application, allowed the other Defendants to change the natural flow of water in certain natural tributaries in Salt Lake County, and also to divert water from one watershed to another, to change open ditches to underground pipelines, to change points of diversion, to build metering stations, overflow structures, and to otherwise change the course, channel, and conveyance of water from the Bell Canyon Reservoir to the other Defendants' water treatment plant. In paragraph 11 the Plaintiffs alleged the action of the Engineer impacts upon natural tributaries in Salt Lake County without complying with the flood control ordinances in the County, and without complying with other provisions of the Utah State statutes and without obtaining the requisite permit from the Salt Lake County Department of Storm Drainage and Flood Control, from the Salt Lake County Public Works

Department, and from other Salt Lake County and State of Utah offices and agencies.

In paragraph 12 of the said Complaint, the Plaintiffs allege the Engineer made only a cursory investigation of the complaints and protests made by the Plaintiffs, but did not undertake any in-depth investigation, nor did he conduct his own independent engineering inspection and investigation of the property in any intelligent way to determine whether the public welfare would be adversely and negatively affected by the Change Application.

Again, all of these allegations in paragraphs 9, 10, 11 and 12 and other paragraphs of the said Complaint must be taken as true, since the Engineer has not submitted any affidavits controverting these allegations.

2. There is a factual dispute whether the Engineer properly performed his statutory duties pursuant to the provisions of § 73-3-8, Utah Code Annotated, 1953, as amended, to investigate the Change Application to determine whether it would prove detrimental to the public welfare. This issue is more fully discussed in Point 4 of this Brief, which Point 4 of the argument is by reference incorporated herein and made a part hereof. Again, the holdings of this Court provide that in a Rule 56 Motion For Summary Judgment, the allegations in the Second Amended Complaint must be taken as true, since they are not controverted by any discovery or affidavit from the Engineer.

3. The granting of the Engineer's Motion violated the "open door" access to the courts policy stated in Article I, Section 11,

of the Utah Constitution. The Second Amended Complaint shows substantial damage to private and public property which was proximately caused by the action of the Engineer in approving the Change Application submitted by the other Defendants. In Lewis v. Pingree National Bank, 47 U.35, 151 P.588, this Court held a right of action exists for any injury or damage to private property, and neither the Legislature nor municipalities can interfere with that right. In Utah State University v. Sutro & Co., 646 P.2d 715 (Utah 1982), this Court further held the constitution assures access to the courts for the protection of rights and redress of wrongs; therefore, summary judgment which denies the opportunity of trial should be granted only when it clearly appears there is no reasonable probability the party moved against could prevail. In the instant case, and as will be pointed out hereafter in this Brief, there is much "reasonable probability" the Plaintiffs could prevail in the action in the District Court.

For the foregoing reasons, the Plaintiffs submit the Engineer's Motion For Summary Judgment is premature and is not ripe for determination at this time, and is further violative of the provisions of Article I, Section 11, of the Utah Constitution providing open access to the courts and opportunity for trial.

POINT 2

THE PLAINTIFFS ARE "AGGRIEVED PERSONS" WITHIN THE MEANING OF § 73-3-14 UTAH CODE ANNOTATED, 1953, AS AMENDED, BECAUSE THE PLAINTIFFS HAVE A DIRECT, PERSONAL AND ECONOMIC INTEREST IN THE PROPERTY AFFECTED BY THE ENGINEER'S MEMORANDUM DECISION, AND BECAUSE THEIR PROPERTIES HAVE BEEN SEVERELY DAMAGED AND WILL BE REPEATEDLY DAMAGED IN THE FUTURE AS A DIRECT AND PROXIMATE RESULT

OF THE CONDUCT OF THE ENGINEER IN APPROVING THE CHANGE APPLICATION.

In the Engineer's Memorandum in support of his Motion For Summary Judgment [R. 300] on pages 6-16 thereof, the Engineer discusses the issue of whether Plaintiffs are "aggrieved persons" under § 73-3-14 Utah Code Annotated, 1953, as amended. Most of this discussion [R. 309-316] deals with the "Zone of Interest" argument which is not found anywhere in the Utah Water laws. The Engineer argues Utah should follow certain federal court decisions. This "Zone of Interest" concept has not been adopted in Utah. However, since it has been raised, the Plaintiffs will discuss it separately in POINT 3 below. The Plaintiffs will discuss a United States Supreme Court case decided in 1987 which disposes of this issue of "aggrieved persons" adverse to the Engineer. See discussion in Point 3 of Clarke v. Securities Industries Association, 479 U.S. ____, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

With respect to the three pages, [R. 306-309] in the Engineer's Memorandum which attempt to discuss § 73-3-14 without the "Zone of Interest" dialogue, the Plaintiffs submit the Engineer missed the point completely of what this case is all about! All the cases cited by the Engineer stand for the proposition that "A water user, even with an earlier priority, cannot by Change Application increase its historic depletion of water to the detriment of other existing water users." See Engineer's Memorandum at R. 308. The Plaintiffs admit this general principle of law. The Plaintiffs also admit the holdings in several of the other cases cited by the Engineer which all deal with conflicts

between competing water users who both have claimed vested water rights.

However, the Plaintiffs submit there is not one comment in any of these cases cited by the Engineer which defines the term "aggrieved persons" nor what the Utah legislature intended by including these words in § 73-3-14, Utah Code Annotated. Nowhere in Engineer's Memorandum [R. 300-328] is this issue discussed. Without any cases to support the Engineer's interpretation of § 73-3-14, his interpretation in his Memorandum is the Engineer's own private interpretation and is not entitled to any weight whatsoever by this court. The Plaintiffs will cite several cases which specifically interpret the term "any aggrieved person" in statutes identical to §§ 73-3-14 and 73-3-15, and which hold persons similarly situated as the Plaintiffs are clearly "aggrieved persons".

Section 73-3-14 Utah Code Annotated, 1953, as amended, reads in part as follows: "In <u>any</u> <u>case</u> where the decision of the State Engineer is involved, <u>any</u> <u>person</u> <u>aggrieved</u> by the decision may within sixty days after notice bring a civil action in the District Court for a plenary review..." (emphasis added). Again the key term is "<u>any</u> <u>person</u> <u>aggrieved</u>" by the decision of the Engineer. The fact the legislature chose to use the word "any" two times in the first fourteen words of this section indicates a legislative intent to make the appeal process as broad as possible. The cases cited hereafter also adopt this broad interpretation of the term "any person aggrieved."

The Utah legislature said "any case" and "any person." The Engineer in his Memorandum in the trial court, and presumably in his Brief to be filed in this Court, spotlights the term "vested water rights" and impairment of such rights. He argues a person cannot be aggrieved unless he has some "vested water rights" even though his property may be wiped out as effectively as by an earthquake by the change application. However, in § 73-3-14, there is no attempt to restrict the persons entitled to plenary review in the District Court to only those who have "vested water rights." Had the legislature wanted to so restrict the plenary review to only those with "vested water rights," the legislature could have clearly done so with appropriate language.

The "Zone of Interest" concept contended for by the Engineer in his Memorandum does not require the "persons aggrieved" to appear in the administrative proceedings. See POINT 3 below discussing the "Zone of Interest" issue. Yet the Engineer argues the plaintiffs other than Stanley B. Bonham have no standing, because they did not file a formal "Protes" nor appear at the hearing in the Engineer's office. The Plaintiff Stanley B. Bonham was a formal protestant, did file a protest, did appear at the hearing, and his problems allegedly were investigated by the Engineer. The fact the other Plaintiffs did not formally appear in these administrative proceedings, is not fatal to their cause of action, and all the cases construing the term "any aggrieved person" hold the definition of the term does not require a person to be a party to the state agency proceedings, nor do they need to

have even an economic interest in the proceedings, so long as they can show a direct, personal interest. Kramer v. Government of the Virgin Islands, 453 F.2d 1245 (3rd Cir. 1971), Tanner v. City of Boulder, 151 Colo. 283, 377 P.2d 945 (1962), and Clarke, supra.

The Plaintiffs submit Kramer, supra, is virtually identical to the instant case, and disposes of all the arguments made by the Engineer with respect to how the language "any person aggrieved" in § 73-3-14 should be interpreted. In Kramer, the Plaintiffs were owners of property directly overlooking the site of a proposed drive-in theater. They appealed from an order of the District Court of the Virgin Islands dismissing their Complaint on the grounds that since they were not parties in the proceedings before the Board of Appeals, they had no standing to seek review of the Board's decision under the applicable statutes. The statute in the Kramer case is virtually identical to its Utah counterpart. That statute provided in part as follows:

> Any person aggrieved by any decision of the Board may seek review of the same by the District Court of the Virgin Islands. Appeal for such review must be made within thirty days of receipt of decision by the person seeking review. (emphasis added).

The District Court reasoned that since the time within which review may be brought runs from the date the would-be Plaintiff receives the Board's decision, and since the Board would notify only those parties before it, it followed that persons who are not parties before the Board cannot come within the class of "any persons aggrieved." This argument is exactly like the argument made by the Engineer in his Motion for Summary Judgment. The

Engineer argues the Plaintiffs other than Stanley B. Bonham were not parties to the proceedings in the Engineer's office, and therefore were not "aggrieved" by the Engineer's Memorandum Decision. The language used in the Virgin Island statute is even stronger in support of his conclusion than the language in 73-3-14. However, Kramer holds against the Engineer and not only interprets what the term "any person aggrieved by any decision" means, but also stated it is not necessary for a party to appear in the administrative proceedings to be an "aggrieved person."

The United States Court of Appeals for the Third Circuit reversed the U.S. District Court and determined the legislative intent by the simple wording of the statute which is identical to ^S 73-3-14 Utah Code Annotated, 1953, as amended. The Circuit Court held the legislature's intent was to allow appeal rights even though the persons had not formally appeared in the administrative proceeding. Again the key to interpreting the legislative intent was the use of the word "any" just as in the Utah water laws.

> [1-3] We cannot agree with the District Court's interpretation. The Virgin Islands Legislature chose the words 'any person aggrieved by any decisions' (emphasis added) to delineate the class of persons granted the right of review under this statute. It is a well settled rule of statutory construction that the legislature must be presumed to use words in their known and ordinary significance [citing United States Supreme Court and other federal court cases]. Application of this principle to the instant case can lead to but one result. 'Any person aggrieved by any decision' encompasses all persons who were aggrieved by any decision of the Board of Appeals, not just parties before the Board. The only limitation upon the class is that they be aggrieved. The 30-day period in which an appeal must be taken is not a limitation upon the class of persons granted a right of appeal but rather an attempt to limit the time in which an appeal may be taken. In determining whether or not a person is aggrieved, federal courts have held that to

be aggrieved an affected party need not have a personal economic interest. He needs only to show a direct personal interest. See Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 615 (C.A.2, 1965), cert. denied, Consolidated Edison Co. of N.Y., Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 5040 (1966). In that case, the court in interpreting a statute similar to the statute involved in the instant case held:

> Those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties * * *." 354 F.2d 616.

Appellants in the instant case meet this criterion. As landowners in the area of and overlooking the site of a proposed drive-in theater, they have a special and direct personal interest in its location. (emphasis added).

Similarly, in the instant case, the Plaintiffs have alleged in their Second Amended Complaint their personal, economic, and direct interest in the Engineer's Memorandum Decision. They alleged the Engineer's approval of the Change Application violates their rights as owners of property in that the Defendants are permitted solely by virtue of the changes allowed in their Application to unreasonably discharge virtual waterfalls on the Plaintiffs' properties at the Defendants' sole whim and will, whenever the screwgate is lowered in the Defendants' diversion structure.

In Tanner, supra, the Colorado Supreme Court held a statute authorizing "any person aggrieved" by any annexation proceeding to obtain judicial relief is not limited to those who are entitled to protest as landowners in the area to be annexed, but the statute includes any person who shows he is in fact aggrieved by the

offending ordinance. Similarly, in the instant case, even if none of the Plaintiffs had appeared as protestants in the hearing on Defendants' joint Change Application, they would still not be precluded from filing this action in the District Court as "aggrieved persons." However, as everyone admits, the Plaintiff Stanley B. Bonham did file a formal protest pursuant to the provisions of § 73-3-7, and the Engineer does not challenge his standing to file a protest, which that section states must be "duly considered by the state engineer."

The Engineer also treated the Plaintiffs as "aggrieved persons" during his administrative proceedings. If the issue of "aggrieved persons" is as simple as the Engineer contends in its Memorandum it is, then why did the Engineer hold a formal hearing on the Bonham protest in February, 1985, make an on-site field investigation of the Plaintiffs' properties and the Defendants' improvements in May of 1985, and then wait an additional seven months to further investigate this matter before issuing his Memorandum Decision on December 26, 1985? If the issue of "aggrieved parties" involves only "impairment of vested water rights," the Engineer could easily have disposed of this matter in a summary fashion, since he knew the Plaintiffs did not own any vested water rights. See the affidavit of the Engineer's Employee, Kent Jones, verifying the Plaintiffs had no vested water rights. [R. 291-292].

In his Memorandum, the Engineer acknowledges at the hearing in the District Court on August 6, 1987, on the Plaintiffs' Motion

To Strike Certain Defenses, the Court told counsel for the Engineer he had some reservations about the issue of "aggrieved parties" and also other issues as raised in the Engineer's Memorandum. [See R. 302 of the Engineer's Memorandum which acknowledges this concern on the part of the Court at the August 6 hearing.] The Court expressed concern over Article 1 Section 11 of the Utah Constitution which states all courts will be open for a redress of any injuries done to the parties, and no person should be deprived of their right to come into court. The trial judge also raised the question as to why shouldn't the duties of the State Engineer in § 73-3-8 apply as much to Change Applications as to Original Applications in order to ensure the public welfare was protected as required by § 73-3-8.

The issues involving the Engineer's duties to undertake the investigation described in § 73-3-8 are discussed in POINT 4, infra. The important aspect of the trial judge's comments with respect to this POINT 2, is that he did express reservations about the Plaintiffs not being able to pursue their remedies in the courts if the interpretation placed on § 73-3-14 by the State Engineer was correct. The Plaintiffs submit it was not correct for all of the reasons set forth in this POINT 2 and the other POINTS in this memorandum, and also for the following reasons:

The Engineer, throughout his Memorandum, appears to be taking the position he is above the law, and Plaintiffs have no right to commence legal action against the Engineer, even though the Engineer's action triggered the very damage which the Plaintiffs

experienced and which could in the future wipe out a large part of their real estate. Obviously the Engineer's interpretation shuts the Court's doors to any redress by the Plaintiffs. This is contrary to the express provisions of Article 1 Section 11 of the Utah Constitution stating that all courts will be open. The Utah Supreme Court has also held the power of the State Engineer is not absolute! The Engineer is asking for judicial immunity in this case. This Court hit this argument head on and dismissed it as being without merit. In American Fork Irrigation Company, et al. v. Link, et al., 239 P.2d 188 (1951), Justice Henroid held in part as follows:

> [1] We need not discuss at length defendants' contention that the engineer's conclusion as to the practicability of administering a proposed change should remain invalid and immune from judicial review or reversal. Recently this court negatived such contentions, announcing that the engineer's findings and decisions have a sanctity extending no further than the authority delegated by law to his office. Also that such findings and decisions, administrative in nature, merit studied consideration at great length, nevertheless the judiciary is the sole ultimate arbiter of law and fact in water cases, bound neither by the nature, extent or content of his decision, nor as to the character, quantum or quality of proof, evidence or data deduced at hearings before him or accumulated independently by his office. Our legislature obviously invested him with important but not conclusive discretionary powers and duties deserving of great respect, but as a safeguard against possible injustice, and by plenary review on trial de novo, it also invested the court with the ultima ratio and final say as to the conflicting contentions of applicant and protestant. For example, where the application is for appropriation of water, the court may receive and consider competent and admissible evidence dehors the record, findings, data, or decision developed in the Engineer's office relating thereto... [emphasis added].

Similar in the instant case, and since the Engineer has not conducted any discovery whatsoever nor controverted any of the

allegations in the Second Amended Complaint, the Engineer and this Court must assume these allegations are true and admit Plaintiffs' properties will be damaged by the improvements which are constructed as a part of the Change Application approved by the Engineer. The Engineer must further admit as true all the allegations in the Second Amended Complaint describing the extensive damage to Plaintiffs' properties and their cattle and horse business as a sole and proximate result of the Engineer's approval of the Change Application. None of the flooding damage to the Plaintiffs' properties occurred prior to the time the Change Application was approved. Even though the Engineer admits the Change Application and improvements constructed pursuant thereto are the direct and proximate cause of the damage to the Plaintiffs' properties, the Engineer still argues he is immune from judicial review in this action. Obviously such a position is contrary to the Utah Constitution and the interpretation of every state and federal court which has construed the terms "any aggrieved person." Again, since the Engineer has not cited one case defining the critical term "any aggrieved person," the Plaintiffs submit the holdings of the courts in this Memorandum must control, and the Engineer's Motion For Summary Judgment should be denied.

Section 73-3-14 allows judicial "plenary" review in a trial de novo. Plenary review is the broadest of all types of appellate examination. The word "plenary" means full, entire, complete, absolute, perfect, unqualified. Mashunkashey v. Mashunkashey, et al., 134 P.2d 976, 979 (Okl. 1942). Plenary review has also been

defined as a "full review, a complete review." D&RGWRRR v. PSC, 98 Utah 431 100 P.2d 552, 555 (1940).

The United States Tenth Circuit Court of Appeals has discussed the issue of "standing" with respect to Rule 24(a)(2) of the Federal Rules of Civil Procedure "FRCP". Sanguine, Ltd. v. U.S. Department of Interior, 736 F.2d 1416 (10th Cir. 1984) and Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978). In Natural Resources, the Tenth Circuit dealt with the sufficiency of an interest to support standing in judicial review. The Court held the interest to sue does not hinge on a direct interest, that construction being too narrow. The Court held the parties' standing can be rejected only if it can be shown there is no property interest of any character that could be impaired by the outcome. The Court further held such an interest did not even have to be a direct interest. In this case, the Tenth Circuit recognized a claim that bird feathers were ecologically threatened was an insufficient interest to maintain an action.

In Sanguine, supra, the Tenth Circuit further held that where nine individuals sought to intervene in an action involving a mineral lease, the said individuals had standing to sue under Rule 24(a)(2) FRCP, since they could show a direct ecomonic benefit in a ruling which might be favorable to them. The government resisted the intervention on the grounds of untimeliness and also upon the failure of the nine intervenors to show an interest "relating to the property or transaction which is the subject to the action"

under Rule 24.

It is recognized these two Tenth Circuit Court of Appeals cases deal with litigation in the United States District Court under the Federal Rules of Civil Procedure. They do not involve an appeal of an administrative agency. The United States Supreme Court in Clarke, supra, has greatly enlarged the rights of judicial review to those persons who are aggrieved because of the decision of a state administrative agency. In this sense, the instant case involving the Utah State Engineer is more like the administrative procedures cases cited in Clarke, than the Tenth Circuit Court cases. However, the Tenth Circuit Court cases are cited simply to show that even in direct actions, as opposed to appeals from administrative bodies, the courts are willing to consider the question of standing and to enlarge the group protected. For example, in Sanguine, the Tenth Circuit Court held the nine intervenors did have sufficient interest to maintain the litigation. The Court stated their interpretation of the "interest" requirement was a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with...due process." 736 F.2d 1420.

In 1A C.J.S. 444 Actions § 58, the author defines "an aggrieved party" as one suffering a direct and actual damage -- "...the party to sue is one whose right, or a duty to whom, has been violated...".

For the reasons discussed above, the Plaintiffs submit they are "aggrieved persons" as that term is used in § 73-3-14 and 15

Utah Code Annotated, 1953, as amended.

The Engineer relies upon the case of Crafts v. Hansen, 667 P.2d 168 (Utah 1983) and cites this case several times in his Trial Memorandum [R. 300]. The Crafts case did not answer any of the issues raised in the instant case. Crafts did not discuss whether the Plaintiffs would be "aggrieved parties" under § 73-3-14 under the circumstances in this case. In fact, §§ 73-3-14 and 15 were not even involved in Crafts. Furthermore, this Court in Crafts did not discuss whether the Engineer's statutory duties of investigation described in § 73-3-8 Utah Code Annotated, 1953, as amended, apply to Permanent Change Applications described in § 73-3-3. Since neither of these critical issues, which are the only issues presented for review in the instant case, were discussed in Crafts, the Plaintiffs do not understand the Engineer's citation to Crafts. Actually, Crafts recognizes prior motions of the Utah State Engineer for Summary Judgment have never been decided on the basis of affidavits only, but always after a full trial of the issues. In our case, the Engineer has not even filed opposing or controverting affidavits as was the case in Crafts. With respect to this issue, the Court stated on page 1080 of the Pacific 2d Reporter as follows:

> It is noteworthy that none of the respondents have, so far as we can determine, cited a single case wherein the trial court upheld an order of the State Engineer in a water dispute by summary judgment on the basis of opinion testimony and affidavits. Every case discussed by the respondents was decided after a full trial in the District Court...The fact that summary disposition of such cases appears to have been rare or nonexistent does underscore the nature and kind of evidence likely to be relied on by the parties therein, and offered by the parties here.

If the Engineer's Motion For Summary Judgment is granted, the Plaintiffs' cause of action against the Engineer will be dismissed with prejudice. The Plaintiffs submit such a result under the circumstances of this case at the time the Motion For Summary Judgment was filed, and without any discovery proceedings or controverting affidavits filed by the Engineer, violates the provisions of Article I, Section 11, of the Utah Constitution which provides in part, "All courts shall be open, and every person, for an injury done to him and his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay;...". See the Plaintiffs' discussion of this constitutional provision in Point 1, supra, and paragraph 3 therein.

Again, the issues presented to this Court in this case are ones of first impression, and there are no Utah cases which the Engineer has cited which even remotely discuss the issues involved under the factual circumstances in this case.

POINT 3

THE PLAINTIFFS ARE WITHIN THE "ZONE OF INTEREST" TEST DISCUSSED ON PAGES 9-16 OF THE ENGINEER'S MEMORANDUM, BECAUSE THE PLAINTIFFS HAVE SUSTAINED BOTH A LEGAL AND ECONOMIC DAMAGE, BECAUSE THEY ARE WITHIN THE CLASS OF PERSONS THE LEGISLATURE SOUGHT TO PROTECT WHEN IT ENACTED § 73-3-14, AND BECAUSE THE UNITED STATES SUPREME COURT DECIDED IN 1987, THE TERM "ZONE OF INTEREST" SHOULD BE CONSTRUED "NOT GRUDGINGLY BUT AS SERVING A BROADLY REMEDIAL PURPOSE," AND AS GRANTING "GENEROUS REVIEW PROVISIONS" TO PERSONS ADVERSELY EFFECTED OR AGGRIEVED.

As discussed in POINT 1, above, the Defendant Engineer has not

cited in his Memorandum [R.300] even one case construing the term "any person aggrieved" as used in § 73-3-14 Utah Code Annotated, 1953, as amended. On the other hand, the Plaintiffs have cited in POINT 1, above, cases construing the term "any persons aggrieved" which hold the Plaintiffs in the instant case would come within the definition of this term as interpreted by the various federal and state courts. In an attempt to find cases to support his conclusion, the Engineer drifts into the "Zone of Interest" concept discussed by some of the lower federal courts in construing Section 10 of the Administrative Procedures Act.

Unfortunately, the Engineer in his Memorandum in support of his Motion For Summary Judgment [R. 300] failed to cite a very recent case decided only last year by the United States Supreme Court which interprets the term "Zone of Interest" and "aggrieved persons" in a manner adverse to the position taken by the Engineer. Clarke v. Securities Industries Association, 479 U.S. ____, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The Engineer's counsel knew about this case because Plaintiffs' counsel cited it at the hearing in the trial court on August 6, 1987, and the Engineer's counsel admitted he was aware of it. Why the Engineer failed to cite this case in his Memorandum is a mystery to the Plaintiffs, unless the Engineer recognizes the United States Supreme Court has already decided this issue adverse to the Engineer's position.

In Clarke, the United States Comptroller of the Currency granted two national banks the right to open affiliated offices outside of their own state of incorporation. This was an

administrative decision by a federal agency (Comptroller of the Currency), and the principles involved are similar to the administrative decision of the state agency (Utah State Engineer) in the instant case.

In Clarke, the Securities Industries Association, a trade association representing securities brokers, underwriters, and investment bankers sued in the United States District Court for the District of Columbia contending the national banks' brokerage offices in other states were "branches" within the meaning of § 36(f) of the National Bank Act (12 U.S.C.S. § 81) and thus subject to the geographical restrictions imposed by § 36(c).

The two national banks raised the same argument the Engineer does in the instant case, to-wit, the Securities Industries Association did not have standing to sue in the United States District Court. The opinion does not state the Association even appeared in the proceedings before the Comptroller of the Currency, nor did the Association voice any objection to the Comptroller's decision prior to the time the lawsuit was filed. However, that point is not critical to the "Zone of Interest" issue and so will not be discussed further.

In Clarke, the two national banks adopted the position eventually supported by the Comptroller of the Currency that the trade association "lacks standing because it is not within the zone of interest protected by the McFadden Act." [44 Stat. 1228 as amended.] The Comptroller contended Congress passed the McFadden Act not to protect securities dealers but to establish competitive

equality between state and national banks. This is the same argument the Engineer is asking this Court to approve in his instant Motion For Summary Judgment, that is, the water law review provisions in § 73-3-14 are only to protect persons with vested water rights, and, therefore, the Plaintiffs lack standing because they did not own any water rights.

In responding to this argument, the United States District Court, the Court of Appeals for the District of Columbia, and the United States Supreme Court all held the interpretation placed upon § 10 of the Administrative Procedures Act by the Comptroller of the Currency "was too narrow a construction," and did not take into account the Administrative Procedure Act's "generous review provisions" and its "broadly remedial purpose." The Comptroller interpreted the statute to require an "aggrieved person" to demonstrate either a "legal interest" as that term had been narrowly construed in the earlier United States Supreme Court cases, or alternatively as requiring an explicit provision in the relevant statute permitting suit by any party "adversely effected or aggrieved. The Plaintiffs submit the Engineer's arguments in the instant case are precisely the same as those contended for by the Comptroller of the Currency.

Section 10 of the Administrative Procedures Act [APA], 5 U.S.C. § 702 grants "standing to a person aggrieved by agency action within the meaning of a relevant statute." [emphasis added]. This is similar to the words "any person aggrieved" in § 73-3-14 Utah Code Annotated. The United States Supreme Court

stated it was unwilling to adopt the Comptroller's narrow view of the APA's "generous review provisions." Rather, the Court emphasized a previous decision involving data processors which held, "The act should be construed not grudgingly but as serving a broadly remedial purpose... accordingly the data processors could be within that class of aggrieved persons who under § 702 are entitled to judicial review of agency action... even though the National Bank Act itself has no reference to aggrieved persons, and, for that matter, no review provisions whatsoever." [emphasis added].

Again, the failure of the Engineer to cite this very recent and relevant case in its Memorandum [R. 300] can only be interpreted as an acknowledgment on the part of the Engineer that the United States Supreme Court has held against its position. The Plaintiffs submit this case effectively disposes of all of the arguments raised in the Engineer's Memorandum in POINT 1 dealing with "Zone of Interest" on [R. 309-316].

Clarke cited extensively from prior United States Supreme Court cases dealing with the "Zone of Interest" concept. Association of Data Processing Service Organizations, Inc. v. Camp, 397 US 150, 25 L.Ed 2d 184, 90 S.Ct. 827 (1970) and Japan Whaling Association v. American Cetecean Society, 478 U.S.____, 92 L.Ed 2d 166, 106 S.Ct. 2860 (1986). In Data Processing, the association challenged a ruling by the Comptroller allowing national banks, as part of their incidental powers under 12 USC § 24 Seventh [12 USC § 24 Seventh] to make data processing services available to other

banks and the bank customers. There was no serious question that the data processors had sustained an injury in fact by virtue of the Comptroller's action. Rather, the question, which the Court described as one of standing, was whether the data processors should be heard to complain of that injury. Similarly in the instant case, the Engineer must admit the Plaintiffs have sustained serious and substantial damages, as morely fully set forth in their Second Amended Complaint; however, the Engineer has taken the position the Plaintiffs should not be heard to complain of that injury in an appeal from the Engineer's administrative agency decision.

In Data Processing, the Court said the matter was basically "one of interpreting congressional intent," and the Court looked to § 10 of the Administrative Procedures Act which "grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'" The Court of Appeals had interpreted § 702 of the Administrative Procedures Act ("APA") as requiring either (1) the showing of a "legal interest," as that term had been narrowly construed in the Supreme Court's earlier cases, or (2) alternatively as requiring an explicit provision in the relevant statute permitting suit by any party "adversely affected or aggrieved." The Supreme Court recognized it was unwilling to take so narrow a view of the APA's "generous review provisions," and stated that in accordance with previous decisions, the Act should be construed "not grudgingly but as serving a broadly remedial purpose." The Court then stated, "Accordingly, the data processors

could be 'within that class of aggrieved persons' who under § 702 are entitled to judicial review of 'agency action', even though the National Bank Act itself has no reference to aggrieved persons, and, for that matter, no review provision whatsoever." [emphasis added]

It then appears clear in Data Processing the United States Supreme Court found standing to sue under the Federal Administrative Procedure Act even though the National Banking Act made no reference whatsoever to "aggrieved persons" and did not provide for any "review" relief. Obviously, the Court wanted to enlarge and broaden the class of the protected persons substantially and did so, even though the relevant statute lacked the built-in definitions of "aggrieved persons" or review proceedings. In §§ 73-3-14 and 15, Utah Code Annotated, 1953, as amended, the Utah Legislature makes specific reference to "any person aggrieved by any decision..." and has also allowed generous "plenary" review proceedings. Accordingly, the question marks which existed in Data Processing because of the absence of either a definition of "aggrieved persons" or review proceedings would not be present in the instant case, and this Court should enlarge and broaden the class of protected persons at least to the same extent the United States Supreme Court did.

In Clarke, the Court noted it had recently reaffirmed the liberal reading of the review provisions of the Federal Administrative Procedures Act in a recent case -- Japan Whaling Association v. American Cetecean Society, 478 U.S. 106 S.Ct. 2860,

92 L.Ed 2d 166 (1986). In Japan Whaling, the Cetecean Society sought judicial review of the Secretary of Commerce's refusal to carry out his alleged duty under the Pelly Amendment of the Fisherman's Protective Act of 1967 to certify Japan for taking actions that diminished the effectiveness of the International Convention for the Regulation of Whaling. The Secretary contended, among other things, that the Cetecean Society had no private cause of action under the Pelly Amendment.

The Court rejected this argument and expressly held the Respondents did have a right of action "expressly created by the Administrative Procedure Act (APA), which states that 'final agency action for which there is no other adequate remedy in a court [is] subject to judicial review,' § 704, at the behest of '[a] person...adversely affected or aggrieved by agency action." The words "a person adversely affected or aggrieved by agency action," are virtually identical to the language found in § 73-3-14 which allows judicial review to "any person aggrieved by any decision...". Obviously, again, in 1986, the United States Supreme Court wanted to enlarge or broaden the definition of "aggrieved" persons who were protected and who had a right of appeal from Federal Administrative Procedures Act agency decisions. This is exactly the case we have in the instant action wherein an official Utah State agency decision is involved.

In Japan Whaling, the Supreme Court cited from an earlier decision and went even further in making a stronger case for enlarging the class of protected persons. The Court cited Block

v. Community Nutrition Institute, 467 US 340, 104 S.Ct. 2450, 81 L.Ed 2d 270 (1984) and adopted the holding therein to the effect, "[a] separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review for such action is available absent some clear and convincing evidence of legislative intention to preclude review." [emphasis added]

Applying these holdings in these United States Supreme Court cases to the instant case then, it is clear there does not have to be a congressional or Utah legislative intent to make the Engineer's agency action reviewable, rather the rule is that "the cause of action for review of the Engineer's action is available absent some clear and convincing evidence of legislative intention to preclude review." In the instant case, not only is there a total absence of any clear and convincing evidence of an intention on the part of the Utah Legislature to preclude review by the Plaintiffs, rather the language in the statutes is abundantly clear to show the Utah Legislature intended a review. §§ 73-3-14 and 15 are clear in setting out this intention.

In Clarke, the United States Supreme Court discussed the "Zone of Interest" concept. In referring to the Data Processing case, the Court stated, "It was thought, however, that Congress in enacting § 702 had not intended to allow suit by every person suffering injury in fact. What was needed was a gloss on the meaning of § 702. The Court supplied this gloss by adding to the requirement that the Complainant be "adversely affected or

aggrieved," i.e., injured in fact, the additional requirement that "the interest sought to be protected by the Complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

The Court recognized the "Zone of Interest" formula in Data Processing has not proved self-explanatory, "but significant guidance can nonetheless be drawn from that opinion. First. The Court interpreted the phrase 'a relevant statute' in § 702 broadly...Second. The Court approved the "trend...toward [the] enlargement of the class of people who may protest administrative action...The Court struck the balance in a manner favoring review, but excluding those would-be plaintiffs not even 'arguably within the zone of interest to be protected or regulated by the statute...'" [emphasis added]

The Court continued discussing the zone-of-interest test in part as follows:

> [3b] The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision...The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff. [emphasis added]

Thus, the United States Supreme Court in discussing the "Zone of Interest" concept stated that the Congress' [in Utah it would be the Legislature's] "evident intent" was to make agency action presumptively reviewable. The class of persons protected is broadened and there need be no indication of congressional purpose

to benefit the would-be plaintiffs -- the plaintiffs in the instant case. The Engineer in this case argues diametrically opposite to the discussion holding in these United States Supreme Court cases. The Engineer argues there must be an explicit comment in the statutes to allow the plaintiffs in the instant case to receive the benefit of the generous review provisions in §§ 73-3-14 and 15. The Engineer would strip away any "presumption" to make agency action reviewable, and would hold not only there is no such presumption, but contends further there must be express language to bring the plaintiffs within the perview of the water laws appeal provisions. Obviously, none of the language in Clarke supports the Engineer's conclusion.

Other Federal Circuit Court of Appeals cases construing Clarke have reached decisions contrary to the position taken by the Engineer in the instant case. LSI Computer Systems, Inc. v. United States International Trade Commission, 832 F.2d 588 (Fed. Cir. 1987). In LSI, the Federal Circuit Court of Appeals held that a manufacturer of component parts used in products which were excluded because of patent infringement was a "person" entitled to appeal the exclusion order, even though it had not been a party to the proceedings before the International Trade Commission. The Engineer in the instant case argues that because the Plaintiffs other than Stanley B. Bonham were not parties to the proceedings before the Utah State Engineer, they have no standing to sue. Both Clarke, Data Processing, Japan Whaling, and LSI expressly hold that a "party aggrieved" from the decision of an administrative action

has the broad appeal protection afforded by the Administrative Procedures Act, even though that party was not present in the agency proceedings itself. This was also the holding in the Kramer v. Virgin Islands case, supra. See discussion in Point 2 of this Brief dealing with the Kramer case.

In LSI, the Federal Circuit Court relied on Clarke to interpret the "standing" issue. The Court discussed this matter in part as follows:

> The Supreme Court has recognized similar language in other statutes providing appellate standing to 'all persons adversely affected.' [Citation to Clarke omitted]. Moreover in Clarke, the Supreme Court applied a 'zone of interest' test for determining standing to appeal from an administrative decision, first set forth in Ass'n. of Data Processing Service Org., Inc. v. Camp, 397 US 150, 153, 90 S.Ct. 827, 829 25 L.Ed 2d 184 (1970), where the statute involved is without an explicit provision specifying who may appeal. Thus, even when a statute does not explicitly provide for appeals by non-party "persons" appellate standing is not necessarily limited to parties only. That result reflects the Supreme Court's recognition in Data Processing of a 'trend...toward [the] enlargement of a class of people who may protest administrative action.'

Thus it appears clear the Circuit Courts of Appeal are interpreting Clarke, Data Processing, Japan Whaling, and other cases to be a recognition there is a trend toward enlarging the class of people who may protest administrative actions, and even when the statute involved does not have explicit provisions specifying who may appeal, the rule is that persons should be allowed in, even though they were not parties in the administrative proceedings "absent some clear and convincing evidence of legislative intention to preclude review."

For the foregoing reasons, the Plaintiffs submit even under

the Engineer's "Zone of Interest" concept, the Engineer must fail in his Motion For Summary Judgment, because the United States Supreme Court and the Federal Courts have interpreted agency review to enlarge and broaden the group of people protected, and has allowed such judicial review even to those who were not parties in the agency proceedings. The Plaintiffs recognize in those cases where an administrative agency proceedings are not involved, and when direct actions are started in the courts by the parties, for the purpose of litigating differences, not for the purpose of reviewing decisions of administrative agencies, and if there is a statute restricting the class of persons who may enter into the original judicial form, those statutes might be authoritative. However, the instant case does not present this factual scenario. This is not an original proceeding in a court of law to litigate differences between the parties, but this appeal involves in Count 1 of the Second Amended Complaint a direct action to review the Memorandum Decision of the Engineer. There are no statutes prohibiting review, and in fact the cases cited in this Point 3 of the Appellants' Brief are authority for liberalizing, enlarging, and broadening the class of the persons protected.

POINT 4

THE ENGINEER'S DUTIES AND RESPONSIBILITIES CLEARLY OUTLINED IN § 73-3-8 UTAH CODE ANNOTATED, 1953, AS AMENDED, DO APPLY TO PERMANENT CHANGE APPLICATIONS COVERED BY § 73-3-3, BECAUSE § 73-3-3(2) EXPRESSLY MAKES THESE DUTIES AND RESPONSIBILITIES APPLICABLE TO CHANGE APPLICATIONS, AND BECAUSE THERE IS NO RATIONAL BASIS FOR EXCLUDING THEM.

The last POINT, POINT II, raised by the Engineer in his Memorandum [R. 300] deals with the issue of whether the duties and responsibilities which the Utah legislature imposed on the State Engineer in § 73-3-8 -- to conduct adequate investigations and to ensure the public welfare would not be endangered -- apply to Permanent Change Applications or only to "Original" Applications. Again, the Engineer has not cited one case in its Memorandum dealing with this issue. There is no language from any case cited that specifically holds the duties and responsibilities clearly set forth in § 73-3-8 do not apply to permanent Change Applications. Because of this lack of any authority, the Plaintiffs submit the interpretation placed on the statute by the Engineer is the Engineer's own personal interpretation, and is in fact contrary to the express language adopted by the Utah legislature in § 73-3-3(2) which makes the duties and responsibilities in § 73-3-8 applicable to Change Application.

In their Second Amended Complaint, the Plaintiffs allege the Engineer erred in his Memorandum Decision [copy included in Addendum] in that he did not comply with the duties and responsibilities which the Utah legislature had imposed upon him in § 73-3-8 Utah Code Annotated, 1953, as amended, because he did not adequately investigate the allegations which the Plaintiff's witnesses testified to and which the documentary evidence clearly supported at the formal hearing in the Engineer's office. These witnesses and this evidence demonstrated clearly that approval of

the Change Application would be detrimental to the public welfare.

Section 73-3-8 reads in part as follows:

> If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water ... will unreasonably effect public recreation or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If the application does not meet the requirements of this section, it shall be rejected. [emphasis added].

At the formal hearing held on the Defendants' Permanent Change Application pursuant to § 73-3-3, the Plaintiffs were present with their Engineer, Jack DeMass and Associates, and their attorneys. At this hearing held in February, 1985, the Plaintiffs submitted substantial evidence which clearly showed the Change Application and the improvements which would be constructed pursuant thereto, would unreasonably effect the public recreation and would also prove detrimental to the public welfare. See Engineer's Memorandum Decision in the Addendum and his statements on page 2 thereof dealing with this evidence. It was based on this substantial evidence, the Engineer did, in fact, undertake a separate, independent investigation of the Plaintiffs' properties and the public properties in the area during May, 1985. See page 2 of the said Memorandum Decision.

The Plaintiffs allege in Count 1 of their Second Amended Complaint [R. 53] the Engineer was negligent during this ten-month investigation and he failed to apply the statutorily mandated in-depth investigation required by § 73-3-8. The Engineer does not deny this negligence anywhere in his Memorandum! He merely says

now, after conducting this ten-month on-site inspection, etc., he really didn't need to do so and only did it presumably to be a "good sport!" In attempting to escape responsibility for his negligent investigation, the Engineer now contends any such investigation can impose liability on him only where he is investigating original water applications under § 73-3-2, but has absolutely no bearing on Change Applications, § 73-3-3, even though substantial damage to private and public property results from his approval of the Change Application!

So, now, after going through all this on-site investigation and other research, at a substantial investment of time and money from the state purse, the Engineer now wants this Court to believe he really didn't have to make such an investigation, and the duties and responsibilities imposed upon him by § 73-3-8, under which he made the investigation, really don't apply after all to Change Applications. The Plaintiffs submit this is a futile attempt to torture the clear language in §§ 73-3-3 and 73-3-8 to reach an erroneous result sought by the Engineer to escape liability for his negligent investigation.

Section 73-3-3 by its own terms makes the procedures and provisions of § 73-3-8 applicable to a Permanent Change Application as opposed to a "Temporary" Change Application. Section 73-3-3(2) expressly states in part "...The procedure in the state engineer's office and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place, or purpose of use shall be the same as provided in this Title for

applications to appropriate water;..." [emphasis added]. The Plaintiffs submit the legislature could not have been more clear in expressing its intent to charge the Engineer with the same duties and responsibilities in § 73-3-8 for permanent Change Applications as were intended for Original Water Applications.

Surprisingly the Engineer's Memorandum does not address this point at all! [R. 300] The only comment the Engineer makes is that the "procedure" in the Engineer's office referred to in § 73-3-3(2) merely means publication of notice in newspapers, etc. Nowhere in the Engineer's Memorandum does he cite any cases so holding, and nowhere in the Engineer's Memorandum is there any discussion of what the following language means: "...and rights and duties of the applicants...shall be the same as provided in this Title for applications to appropriate water;...".

The critical point is not whether notice was published in the newspaper, but what were the duties of the Conservancy District and Draper and the Engineer with respect to Change Applications. Section 73-3-3(2) says those duties and responsibilities shall be exactly the same for permanent Change Applications as Original Applications. THE ENGINEER HIMSELF ADMITS HE WOULD HAVE HAD A DUTY TO MAKE THE INVESTIGATION IN § 73-3-8 IF THE APPLICATION SUBMITTED BY THE DEFENDANTS WAS AN ORIGINAL APPLICATION AS OPPOSED TO A CHANGE APPLICATION. See for example footnote 1 on page 9 of the Engineer's Memorandum where he admits "Interests other than impairment of water rights are considered by the State Engineer in passing on applications to appropriate water under §73-3-8, but as

discussed in Point II, infra, such criteria do not apply to Change Applications." [R. 309].

Since the State Engineer in footnote 1 on page 9 of its Memorandum admits the damages of the Plaintiffs sustained would have to be considered under § 73-3-8 in an Original Application, and since the Utah legislature in 73-3-3(2) expressly made these same duties for an Original Application applicable to a Change Application, the Engineer is hard pressed to come up with an argument as to why he should not comply with these clear duties and responsibilities in § 73-3-8 when considering Change Applications. In fact, he does not meet this burden anywhere in his Memorandum.

It is noteworthy § 73-3-8 states "It shall be the duty of the State Engineer to approve an application if:..." [emphasis added]. This language does not purport in any way to limit the term "an application" only to an Original Application to appropriate water under § 73-3-2. It would have been easy to have done so either by simply stating "an Original Application" or by saying § 73-3-8 only applied to § 73-3-2 Applications. Obviously the legislature did not intend such limitation, when it specifically included the language in § 73-3-3 making Permanent Change Applications subject to the same procedures and imposed upon the applicants the same duties as provided in Title 73 for "Applications to Appropriate Water."

Since the applicants -- Draper and the Conservancy District -- had the duty found in § 73-1-8 to "maintain their ditches, canals, flumes or other water courses in repair so as to prevent

waste of water or damage to the property of others," and since § 73-3-3(2) makes this same duty and responsibility applicable to permanent Change Applications, it is surprising the Engineer can overlook these clear legislative mandates, and attempt to escape liability for this negligent ten-month investigation by now claiming he has absolutely no duties and responsibilities whatsoever with respect to permanent Change Applications.

In addition to the express language in § 73-3-3(2) which makes the duties of the applicants and the Engineer subject to the other provisions of Title 73 which obviously include § 73-3-8, there is no other rational basis for holding the Engineer should not be required to follow these same duties and responsibilities imposed upon him in § 73-3-8 when considering Change Applications. The trial judge expressed these concerns at the August 6, 1987 hearing. He asked counsel for the Engineer why his client shouldn't be as concerned with the "public welfare," in § 73-3-3 Permanent Change Applications as he is in Original Applications? [See R. 302 where the Engineer's counsel refers to these concerns by the trial judge.]

Section 73-3-8 highlights the duty of the Engineer to take every preparation to ensure the Change Application is not detrimental to teh public welfare, and tells the Engineer he must reject the Change Application if the public welfare, etc. are adversely affected.

Whether something is "detrimental to the public welfare" as those terms are used in § 73-3-8 has already been interpreted by

the Utah Supreme Court to include a multitude of damages such as alleged in the Plaintiffs' Second Amended Complaint. In Tanner v. Bacon, 136 P.2d 957 (Utah 1943) the Utah Supreme Court was called upon to determine what the legislature meant by the words "detrimental to public welfare." The Court reviewed several statutes in other jurisdictions and concluded in these words on page 964 of the P.2d Reports:

> [17, 18] The State Engineer is also required by the statute to reject an application where in his opinion its approval 'would prove detrimental to the public welfare.'... These decisions hold that anything which is not for the best interest of the public would be 'detrimental to the public welfare.'... Under this construction the State Engineer was authorized to reject or limit the priority of plaintiff's application in the interest of the public welfare. [emphasis added].

Obviously, the Utah Supreme Court has interpreted the term "detrimental to the public welfare" as broadly as possible by holding it means "anything which is not for the best interest of the public." Had the Engineer in the instant case complied with the duties and responsibilities imposed upon his office by § 73-3-8 and made the investigation required therein, he would have easily determined the following facts which clearly are detrimental to the "public welfare" as defined in Tanner, supra. All of these factual allegations are set out in the Plaintiffs' Second Amended Complaint, and they must be regarded as true in a Motion for Summary Judgment, where there are not controverting affidavits on discovery arguments.

1. The Plaintiffs and each of them had enjoyed the peaceable possession of their properties for more than twenty years prior to

the time Defendants submitted their Change Application to the office of the Utah State Engineer.

2. During all this time the Plaintiffs never had been disturbed in their peaceable possession of their property by any water damage caused by waters from either the Middle Fork or South Fork of Dry Creek or from waters collected from the vicinity of Bell Canyon Reservoir and transported to the Defendants' water treatment plant in Draper, Utah.

3. For decades prior to the time the Defendants submitted their Change Application to the office of the Utah State Engineer, the Defendant Draper Irrigation Company had been conveying water from the vicinity of the Bell Canyon Reservoir through pipelines, ditches, flumes, and other water works to Draper's water treatment plant in Draper, Utah, without flooding private or public property in the process.

4. After submitting the Change Application to the Utah State Engineer, the other Defendants, without even waiting for formal final approval of their Change Application, and over the opposition of the protestant Stanley B. Bonham and the other Plaintiffs, undertook to construct certain improvements in their water works, which improvements consisted of a screwgate diversion structure on the hillside immediately to the east of Plaintiffs' properties in Sandy, Utah.

The existence of this screwgate when closed made it impossible for water in the Defendants' ditch facilities to be conveyed in open ditches to the south to the Defendants' water treatment plant

in Draper, Utah as had been done historically. Instead, when the screwgate is closed, the water has no place to go but down the hillside onto Plaintiffs' properties. This water fell in 1983 and 1984 like a Niagara Falls and thoroughly gutted Plaintiffs' properties destroying fences, depositing large boulders and other debris, cutting roads the Plaintiffs needed for their horse and cattle business, splitting a public highway, Dimple Dell Road, and eating away large portions of other public property owned by the Salt Lake County Recreation Department in an area where a proposed public park will be built. This damage has the potential to recur each time the screwgate is shut which can happen any time the defendants desire to do so.

6. Prior to the installation of the screwgate and in approximately April-May of 1983, the Defendants were engaged in constructing a pipeline in the vicinity where the screwgate was later located, and in the construction of the said pipeline, the Defendants allowed waters in their ditches being conveyed from the vicinity of the Bell Canyon Reservoir to the water treatment plant in Draper, Utah, to escape from the ditch facilities and to flood the Plaintiffs' properties causing extensive damage to the properties.

7. As a result of the escape of the said water, not only were the private properties of the Plaintiffs damaged, but also there was substantial damage to public property including Dimple Dell Road, Wasatch Boulevard, and public land to the west of Dimple Dell Road owned by the Salt Lake County Recreation Department and

which was to be used for a park for the public enjoyment of the residents of Salt Lake County.

8. All this damage to the private and public properties could have been prevented had the State Engineer conducted the investigation required of him in § 73-3-8 and had the State Engineer rejected the Change Application, or in the alternative approved the Change Application subject to the condition the other Defendants would make adequate and reasonable provision for conveying waters in their ditches and other water works in a manner that would not cause flooding to the Plaintiffs' properties onto public roads, parks and other public property.

As noted above, the Engineer has not cited one case either from Utah or any other state or federal court interpreting the precise issue discussed in this Point 4, to-wit, whether the Engineer's duties and responsibilities clearly set forth in § 73-3-8 apply to Permanent Change Applications described in § 73-3-3 or apply only to original water applications described in § 73-3-2. Likewise, the Plaintiffs have not been able to find any cases from Utah specifically discussing this point, and this is why the Plaintiffs say this issue is one of first impression in the state. There is, however, a comment in a dissenting opinion by one of the noted scholars formerly on this Court which bears on this issue. Although a dissenting opinion normally is not the law of the case, the context in which Justice Wolfe discusses the application of the predecessor of § 73-3-8 and its application to the successor of § 73-3-3 does have general bearing on this issue.

In Moyle v. Salt Lake City, 176 P.2d 882 (Utah 1947), and on pages 888-902 of his dissent, Justice Wolfe reviews the development of the Utah Water Law. Although the case dealt with conflicting claims by prior appropriators and also the rule of beneficial use, Justice Wolfe on page 895 made a statement in passing which Plaintiffs submit bears directly on the issues in this case. The comments do not necessarily even deal with the issues being discussed by Judge Wolfe, but the fact he made them, and the fact the majority opinion does not disagree with him, is good authority for the proposition the Court recognized these fundamental concepts did exist in general vogue at that time. Justice Wolfe's comments on page 895 of the Pacific 2d Reports on this point are as follows:

> It should be noted that in case of an application for a permanent change as compared to a temporary change, the procedure shall be the same as is provided for in applications to appropriate water. [In other words, the permanent change application procedures in § 73-3-3 shall be the same in those in § 73-3-2.] Section 100-3-8 U.C.A. 1943, [which is the predecessor and virtually identical in language to § 73-3-8 Utah Code Annotated, 1953, as amended] declares when it shall be the duty of the State Engineer to approve an application. The right of the applicant is not absolute. The Engineer is required to determine certain facts some of which involve the element of judgment. In the case of an application for a temporary change of use, the Engineer 'Shall make an order authorizing the change' 'If such temporary change does not impair any vested rights of others.' The Shurtleff case was evidently based largely on the conception of a vested right either complete or incoate as appears from the quoted portion of that case set out above. But the word "shall" is used in § 100-3-3 [which is the predecessor and virtually identical to § 73-3-3 Utah Code Annotated, 1953, as amended] only in connection with an application for a temporary change of place of diversion or place or purpose of use. [emphasis added]

Justice Wolfe noted it was the practice in his day for the Engineer to have the same duties and responsibilities with respect

to permanent change applications which he did with respect original applications to appropriate water in § 73-3-2.

In conclusion, then, the Plaintiffs submit the duties and responsibilities placed upon the Engineer in § 73-3-8 must be followed in considering a permanent change application under § 73-3-3 [as opposed to a temporary change application] to the same extent the Engineer must follow these duties and responsibilities when considering an original water application under § 73-3-2. In the Plaintiffs' Second Amended Complaint, they have alleged substantial negligence on the part of the Engineer in conducting and undertaking the § 73-3-8 investigation, and these allegations of negligence raise genuine issues of fact which would preclude the granting of the Engineer's Motion For Summary Judgment.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully submit the Defendant Utah State Engineer's Motion For Summary Judgment should be denied, the Engineer should be reinstated as a party defendant in the lawsuit, and the Plaintiffs should be allowed to continue with discovery and the trial of this case against all defendants including the Engineer.

DATED this 26th day of August, 1988.

Respectfully Submitted,

JAMES A. MCINTOSH & ASSOCIATES P.C.

James A. McIntosh

JAMES A. MCINTOSH
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 1988, four true and correct copies of the foregoing APPELLANTS' BRIEF were delivered to Michael M. Quealy, Assistant Attorney General, 1636 West North Temple, Suite 300, Salt Lake City, Utah 84116.

JAMES A. MCINTOSH

ADDENDUM

TO

APPELLANTS'

BRIEF

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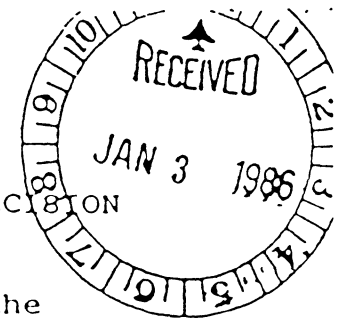

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION)
) MEMORANDUM DECISION
NUMBER 57-3411 (a13077))

Change Application Number 57-3411 (a13077) was filed by the Draper Irrigation Company and the Salt Lake County Water Conservancy District to change the point of diversion, place and nature of use of water rights as evidenced by Decree #3429, 57-3411 (D47), and 57-443 (A13830), titled in the name of the Draper Irrigation Company; the Salt Lake County Water Conservancy District being entitled to the use of portions of said water rights by virtue of an agreement entered into with the Draper Irrigation Company.

It was proposed to change one-half of the entire flow of water in Bell Canyon (North Dry Creek), all the waters of Middle and South Forks Cry Creek, all but 0.18 cfs. of Rocky Mouth and Big Willow Creeks, and 1.4 cfs. of water saved as described in water user claim 57-443 from the same sources as described above.

Water has been diverted at points as follows: North Dry Creek- North 17o 10' East 5020 feet, Middle Fork Dry Creek- North 23o 10" East 2420 feet, South Fork Dry Creek- North 77o 10' East 2020 feet, Big Willow Creek- South 33o 10' West 5055 feet, and Rocky Mouth Creek- South 39o 15' West 3915 feet, all from the NE Corner, Section 23, T3S, R1E, SLB&M, and 9,559.5 acre-feet of water has been used from January 1 to December for domestic, municipal, storage, industrial, and stockwatering purposes, and from April 1 to September 30 for the irrigation of 2716 acres. All water uses were within sections 7, 8, 17, 18, 19, 20, 21, 25, 27, 28, 29, 30, 31, 32, 33, and 36, T3S, R1E, SLB&M, and sections 4, 5, and 6, T4S, R1E, SLB&M.

It was proposed to divert 9,559.5 acre-feet of water from the same sources with flow rates as heretofore, to be diverted from points as follows: North Dry Creek- South 750 feet and East 4121 feet from the N1/4 Corner, Section 14, Middle Fork Dry Creek- South 2783 feet East 3225 feet from the N1/4 Corner, Section 14, South Fork Dry Creek- North 306 feet and East 992 feet from the S1/4 Corner, Section 14, Big Willow Creek- South 2609 feet and West 853 feet from the N1/4 Corner, Section 23, and Rocky Mouth Creek- South 2389 feet and West 493 feet from the N1/4 Corner, Section 23, all T3S, R1E, SLB&M.

The portion of the water to be used by the Draper Irrigation Company would be for the period from January 1, to December 31, and would include domestic, stockwatering, commercial, fire protection, and other purposes incidental to the requirements of Draper City, which would be provided both raw water from the mountain streams herein described, and treated water from the Draper Treatment Plant, which is operated by the Company. The Company would also irrigate 1790.7 acres from April 1 to September 30.

within the same area as described hereto-

EXHIBIT 1

The Salt Lake County Water Conservancy District proposed to use water following treatment at it's Southeast Regional Water Treatment Plant, from January 1, to December 31 for municipal purposes within the Salt Lake County Water Conservancy Districts boundaries. The change application was advertised in the Deseret News from June 28, 1984 through July 12, 1984, and was protested by Stanley B. Bonham.

A hearing was held in Salt Lake City on February 26, 1985 and was attended by the applicants representatives, and the protestant with his representatives. At the hearing the applicants stated that Draper Irrigation Company had a contract with Salt Lake County Water Conservancy District which allowed the District to utilize portions of the Company's water for municipal purposes, following treatment at the District's treatment plant, and that the subject change application had been precipitated by this contractual agreement.

The protestant stated that as a result of the project construction, his property was flooded in 1983 and 1984 causing extensive property damage, and that the now-completed project was constructed such that further flooding of this property could occur in the future due to project maintenance, or for other causes at the option of the District. He further stated that the District had not obtained permits allowing them to discharge water from their system, and that the project as constructed was detrimental to the public welfare.

In an effort to gain additional information relative to this matter, the State Engineer's Staff conducted a field review on May 7, 1985. Representatives of both the applicant and protestant were present for the review, which included observations of alleged damage to the protestant's property, along with observations of the District's construction which took place in connection with temporary water rights change applications approved by the State Engineer.

In a review of the foregoing, the State Engineer concludes that:

1. He is without authority relative to damages which may have been sustained in connection with project construction which occurred as a result of his reaction to water right applications; therefore, this issue does not apply to this change application.

2. The State Engineer is not in receipt of evidence indicating that existing water rights will be impaired if this change application is implemented.

In consideration of these conclusions, it is the opinion of the State Engineer that this application can be approved.

EXHIBIT 1

This decision is subject to the provisions of Section 73-3-14, Utah Code Annotated, 1953, which provides for plenary review by the filing of a civil action in the appropriate district court within sixty days from the date hereof.

Dated this 26th day of December 1985.

Robert L. Morgan, P.E., State Engineer

RLM:EDF:laz

Mailed a copy of the foregoing Memorandum Decision this 26th day of December, 1985 to:

Draper Irrigation Co.
2582 South 950 East
Draper, UT 84020

Salt Lake Water Cons. Dist.
P.O. Box 15618
3495 South 300 West
Salt Lake City, UT 85115

Stanley B. Bonham
10741 Dimple Del Road
Sandy, UT 84092

James A. McIntosh
James A. McIntosh and Assoc.
Suite 14, Intrade Bldg. So.
1399 South 700 East
Salt Lake City, UT 84105

D. Brent Rose
% Clyde & Pratt
200 American Savings Plaza
77 West Second South
Salt Lake City, UT 84101

Lee Kapaloski
% Kapaloski, Kinghorn & Peters
10 Exchange Place
Salt Lake City, UT 84111

EXHIBIT 1

BY: Laurel A. Zundel, Secretary

ARTICLE I, SECTION II, UTAH CONSTITUTION

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

EXHIBIT 2

SECTION 73-3-3 UTAH CODE ANNOTATED, 1953, AS AMENDED

Change of place of diversion or use -- Right to -- Permanent or temporary -- Application -- Contents -- Investigation -- Notice and hearing -- Deposit to cover expenses -- No effect on priority of original application -- Violation as misdemeanor -- Exception as to replacement wells -- Division of Wildlife Resources may file applications -- Purposes -- Conditions -- Finality of state engineer's determination.

(1) Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change may be made if it impairs any vested right without just compensation. These changes may be permanent or temporary. Changes for an indefinite length of time with an intention to relinquish the original point of diversion, place, or purpose of use are defined as permanent changes. Temporary changes include and are limited to all changes for definitely fixed periods of not exceeding one year. Both permanent and temporary changes of point of diversion, place, or purpose of use of water including water involved in general adjudication or other suits, shall be made in the manner provided in this section.

(2) No change may be made unless the change application is approved by the state engineer. Applications shall be made upon forms furnished by the state engineer and shall set forth: the name of the applicant; a description of the water right; the quantity of water; the stream or source; the point on the stream or source where the water is diverted; the point to which it is proposed to change the diversion of the water; the place, purpose, and extent of the proposed use; and any other information that the state engineer may require. The procedure in the state engineer's office and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place, or purpose of use shall be the same as provided in this title for applications to appropriate water; but the state engineer may, in connection with applications for permanent change involving only a change in point of diversion of 660 feet or less, waive the necessity for publishing a notice of application. The state engineer shall investigate all temporary change applications and if he finds that the temporary change will not impair any vested rights of others, he shall make an order authorizing the change. If he finds that the change sought might impair vested rights, he shall give notice of the application to all persons whose rights might be affected by the change and shall give them an opportunity to be heard before authorizing the change. The notice may be given by regular mail at least five days before the hearing or by one publication in a newspaper of general circulation in the county in which the original point of diversion or place of use is located five days before the hearing. Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.

EXHIBIT 3

(3) Applications for either permanent or temporary changes may not be rejected for the sole reason that the change would impair the vested rights of others, but if otherwise proper, they may be approved as to part of the water involved or upon the condition that conflicting rights are acquired.

(4) Any person holding an approved application for the appropriation of water may either permanently or temporarily change the point of diversion, place, or purpose of use, but no such change of an approved application may affect the priority of the original application; except that no change of point of diversion, place, or nature of use set forth in an approved application operates to enlarge the time within which the construction of work shall begin or be completed.

(5) Any person who changes or who attempts to change a point of diversion, place, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section, obtains no right and is guilty of a misdemeanor, each day of such unlawful change constituting a separate offense, separately punishable.

(6) The provisions of this section do not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion from the existing well, and no such replacement well shall be drilled except upon compliance with the requirements of Section 73-3-28.

(7)(a) The Division of Wildlife Resources may file applications for permanent or temporary changes, in accordance with the requirements of this section: (i) on perfected water rights presently owned by the Division of Wildlife Resources; or (ii) on perfected water rights purchased by that division through funding provided for that purpose by legislative appropriation, or acquired by lease, agreement, gift, exchange, contribution; or (iii) on appurtenant water rights acquired with the acquisition of real property for other wildlife purposes.

(b) Changes allowed in Subsection (7)(a) shall only be for the limited purpose of providing water for instream flows in natural channels necessary for the preservation or propagation of fish within a designated section of a natural stream channel. This subsection does not allow enlargement of the water right sought to be changed nor may the change impair any vested water right.

(c) An application filed by the Division of Wildlife Resources shall, in addition to the other requirements of this section, set forth the points on the natural stream between which the necessary instream flows will be provided by the change and shall be accompanied by appropriate studies, reports, or other information required by the state engineer demonstrating the necessity for such instream flows in the specified section of the natural stream, and the projected benefits to the public fishery which will result from the change.

EXHIBIT 3

(d) The Division of Wildlife Resources may not acquire title or a long-term interest in a water right for the purposes provided in Subsection (7)(b) without prior legislative approval. After obtaining this approval, the Division of Wildlife Resources may file a request for a permanent change as provided in Subsection (7)(a).

(e) This Subsection (7) does not authorize the Division of Wildlife Resources to (i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing instream flows, or (ii) acquire water rights by eminent domain for instream flows or for any other purpose.

(f) This Subsection (7) shall only apply to applications filed on or after April 28, 1986.

(8) The determination of the state engineer is final, unless an action to review his decision is filed within the time and in the manner provided Section 73-3-14.

EXHIBIT 3

SECTION 73-3-8 UTAH CODE ANNOTATED, 1953, AS AMENDED

Approval or rejection of application -- Requirements for approval -- Application for specified period of time -- Filing of royalty contract for removal of salt or minerals.

(1) It shall be the duty of the state engineer to approve an application if: (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly. If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.

(2) An application to appropriate water for industrial, power, mining development, manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and certain period from the time the water is placed to beneficial use under the application, but in no event may an application be granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application or until the water is no longer available as determined by the state engineer. At the expiration of the period fixed by the state engineer the water shall revert to the public and is subject to appropriation as provided by Title 73. The state engineer may extend any limited water right upon a showing that the essential purpose of the original application has not been satisfied, that the need for an extension is not the result of any default or neglect by the applicant, and that water is still available; except no extension shall exceed the time necessary to satisfy the primary purpose of the original application. A request for extension must be filed in writing in the office of the state engineer not later than 60 days before the expiration date of the application.

(3) Before the approval of any application for the appropriations of water from navigable lakes or streams of the state which contemplates the recovery of salts and other minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer a copy of a contract for the payment of royalties to the state of Utah. The approval of an application

EXHIBIT 4

shall be revoked in the event of the failure of the applicant to comply with terms of his royalty contract.

EXHIBIT 4

SECTION 73-3-14 UTAH CODE ANNOTATED, 1953, AS AMENDED

Review by courts of engineer's decisions.

In any case where a decision of the state engineer is involved any person aggrieved by the decision may within 60 days after notice bring a civil action in the district court for a plenary review. The state engineer shall give notice of his decision by mailing a copy by regular mail to the applicant and to each protestant. Notice is considered to have been given on the date of mailing. The place of trial, subject to the power of the court to change it as provided by law, shall be in the county in which the stream or water source, or some part of it, is located. The state engineer shall be joined as a defendant in all suits to review his decisions, but no judgment for costs or expenses of the litigation may be rendered against him. Parties shall be served with process as in other cases and notice of the pendency of the action shall be filed by the clerk of the district court with the state engineer within 20 days after it is commenced, which operates to stay all further proceedings pending the decision of the district court. Review of the decision of the district court shall be by the Supreme Court.

Venue for judicial review -- State engineer as defendant.

(1)(a) Any person aggrieved by an order of the state engineer may obtain judicial review by following the procedures and requirements of Chapter 46b, Title 63.

(b) Venue for judicial review of informal adjudicative proceedings shall be in the county in which the stream or water source, or some part of it, is located.

(2) The state engineer shall be joined as defendant in all suits to review his decisions, but no judgment for costs or expenses of the litigation may be rendered against him.

EXHIBIT 5

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STANLEY B. BONHAM and ANNE M. BONHAM; BOYD F. SUMMERHAYS and ARLEEN M. SUMMERHAYS, Plaintiffs, v. ROBERT L. MORGAN, Utah State Engineer; SALT LAKE COUNTY WATER CONSERVANCY DISTRICT, a political subdivision of the State of Utah and a body corporate; and DRAPER IRRIGATION COMPANY, a Utah corporation, Defendants.	**JUDGMENT AND ORDER EXPRESSLY DIRECTING ENTRY OF JUDGMENT PURSUANT TO RULE 54(b)** Civil No. C-86-1341 (Judge Raymond S. Uno)

Defendant Utah State Engineer's Motion for Summary Judgment on Count I of Plaintiffs' Second Amended Complaint came before the Court for hearing on November 20, 1987. Further conferences were held between the Court and counsel by telephone on November 30, 1987 and December 7, 1987. Plaintiffs are represented by James A. McIntosh. Defendant Utah State Engineer is represented by Dallin W. Jensen and Michael M. Quealy. Defendants Draper

EXHIBIT A

Irrigation Company and Salt Lake County Water Conservancy District are represented by Lee E. Kapaloski and Roy S. Axland, respectively.

The Court having reviewed the file, including the affidavits and memoranda of counsel submitted on the present motion; having heard and considered the arguments of counsel, and the Court being fully advised in this matter concludes that the change application process under Section 73-3-3 U.C.A. is narrow in scope; that the issues raised by Plaintiffs are outside the limited criteria governing the approval and rejection of change applications; and that Plaintiffs are not "aggrieved persons" within the meaning of Section 73-3-14 U.C.A.. The Court therefore grants the Motion of Defendant Utah State Engineer for Summary Judgment. Further, the Court has indicated orally in explaining its ruling to counsel that while Plaintiffs are not entitled to bring an action to review the Decision of the State Engineer, their protest and participation before the State Engineer has placed Defendants Salt Lake County Water Conservancy District and Draper Irrigation Company on notice of Plaintiffs' concerns, so as to preserve Plaintiffs' claim for punitive damages as pleaded elsewhere in the Second Amended Complaint.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED, that Defendant State Engineer's Motion for Summary Judgment be, and is hereby granted, and that judgment is hereby entered against Plaintiffs, dismissing with prejudice Count I of Plaintiffs'

EXHIBIT 6

Second Amended Complaint, which is the only Count therein directed at the State Engineer. This judgment does not affect the allegations against the other Defendants as set forth in Plaintiffs' Second Amended Complaint.

The Court hereby expressly determines that there is no just reason for delay and hereby expressly directs that this judgment be entered as a final judgment within the meaning of Rule 54(b) of the Utah Rules of Civil Procedure.

Each party shall bear its own costs.

DATED this 14 day of ~~February~~ March, 1988.

BY THE COURT:

Raymond S. Uno

RAYMOND S. UNO
District Judge

ATTEST
H DIXON HINDLEY
By _____

STATE OF UTAH)
COUNTY OF SALT LAKE) SS

I THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT THIS 22 DAY OF March 1988

H DIXON HINDLEY, CLERK
BY Barbara B. Hall DEPUTY

EXHIBIT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing proposed JUDGMENT AND ORDER EXPRESSLY DIRECTING ENTRY OF JUDGMENT PURSUANT TO RULE 54(b), was served by mailing the same, first class postage prepaid, this 4th day of February, 1988, to:

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EXHIBIT 6